

Chapter 12—Answering the Complaint

§ 12.01 Introduction

If the defendant cannot escape from the litigation on a technicality, the awful day comes when he must address the merits of the plaintiff's claim. He does so in a pleading called an *answer*.

An answer performs two functions. First, it enables the court to identify the [material allegations](#) of the complaint that the defendant disputes. Second, it provides the defendant a vehicle to allege additional matters or objections in opposition to the plaintiff's claim. The answer does not provide the defendant a vehicle to obtain redress against the plaintiff.¹ To claim affirmative relief from the plaintiff, the defendant must file a [cross-complaint](#).

➡ Consequences of Failure to Deny

If the defendant does not controvert a material allegation in the complaint, that allegation is taken as true for purposes of the action.²

§ 12.02 Timing

The time to answer is governed by the time limit mandated for the [summons](#) applicable to the plaintiff's action.³ The Code of Civil Procedure specifies that, in

¹ CODE CIV. PROC. § 431.20(c).

² CODE CIV. PROC. § 431.20(a). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:385–:387, :457–:458 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 967–968 (3d ed. 1985).

the ordinary case, the summons must contain a direction that the defendant respond to the complaint within 30 days after service of the summons.⁴ The time to answer is computed by excluding the day of service of the summons and including the last day of the time to respond unless the last day is a holiday, in which case the last day is also excluded.⁵ In unlawful detainer actions, the summons must specify that the defendant must respond within five days, including Saturdays and Sundays but excluding all other judicial holidays; if the last day for filing the response filed on a Saturday or Sunday, the response period is extended to the next court day.⁶

In case of a dispute subject to an arbitration agreement, the defendant may file a petition to compel arbitration in lieu of filing an answer. If the court denies the petition, the defendant has 15 days to respond to the complaint.⁷

³ CODE CIV. PROC. § 585(a). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 6:386 (1996).

⁴ CODE CIV. PROC. § 412.20(a)(3).

⁵ CODE CIV. PROC. § 12. “Holidays” include every Sunday, January 1st, February 12th (Lincoln Day), the third Monday in February, the last Monday in May, July 4th, the first Monday in September, September 9th (Admission Day), the second Monday in October (Columbus Day), November 11th (Veterans Day), December 25th, Good Friday from 12 noon until 3 p.m., and every day appointed by the president or governor for a public fast, thanksgiving, or holiday. If January 1st, February 12th, March 31st, July 4th, September 9th, November 11th, or December 25th falls upon a Sunday, the Monday following is a holiday. If November 11th falls upon a Saturday, the preceding Friday is a holiday. CODE CIV. PROC. § 10; GOV. CODE §§ 6700–6701. The state holiday for Good Friday was held unconstitutional in *Mandel v. Hodges*, 54 Cal. App. 3d 596, 619, 127 Cal. Rptr. 244, 259 (1976). *See generally* 2 B.E. WITKIN, CALIFORNIA PROCEDURE, *Courts* §§ 66–72 (3d ed. 1985).

⁶ CODE CIV. PROC. §§ 1167, 1167.3.

⁷ CODE CIV. PROC. § 1281.7.

§ 12.03 Form

The defendant must frame his answer in the same format as a complaint, except that the title of the action need only state the name of the first party on each side plus the words “*et al.*”⁸ and the title of the pleading should include the names of each defendant on whose behalf the pleading is filed.⁹ The Judicial Council has adopted the following official forms:

- [Answer—Personal Injury, Property Damage, Wrongful Death](#)
- [Answer—Contract](#)
- [Answer—Unlawful Detainer](#)
- [General Denial](#)
- [Response \(Family Law\)](#).¹⁰

Unless the defendant is entitled to respond to the complaint by means of a [general denial](#), the defendant customarily sets forth his [denials](#) with respect to each cause of action in the plaintiff’s complaint, followed by his [affirmative defenses](#) relating to the complaint as a whole and then by affirmative defenses relating to the individual causes of action. The defendant must state his defenses separately, and each defense must refer to the causes of action the defendant intends them to answer, so that one may intelligibly distinguish them.¹¹ If the plaintiff has [incorporated by reference](#) in

⁸ CODE CIV. PROC. § 422.40. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:388–:397, :460–:461, :468, :482–:486 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 969–970, 1007 (3d ed. 1985).

⁹ *See, e.g.*, L.A. SUPER. CT. R. 9.2, 9.3.

¹⁰ *See generally* 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 971 (3d ed. 1985).

later counts allegations contained in earlier counts, the defendant may avoid repetition by incorporating by reference in his responses to later counts his denials of the same allegations relating to earlier counts.

If the plaintiff joined multiple parties as defendants, they may file a joint answer.¹² If, however, a defendant answers separately, he need not respond to allegations relating solely to another defendant.¹³ No defendant is bound by another defendant's default or by admissions in another defendant's answer.¹⁴ A defendant may not invoke the protection of defenses raised in another defendant's answer but omitted from his own.¹⁵

[A] Prayer

It is customary to conclude the answer with something resembling the complaint's [prayer for relief](#).

Example: “Therefore, defendant prays that plaintiff take nothing by his action and that defendant be awarded judgment in this action, his costs of suit, attorneys’ fees, and such further relief as the court may deem proper.”

No provision of the Code of Civil Procedure requires such a statement. If the defendant is entitled by statute to recover his attorneys’ fees from the plaintiff, the

¹¹ CODE CIV. PROC. § 431.30(g).

¹² *Western Lumber Co. v. Phillips*, 94 Cal. 54, 56, 29 P. 328, 329 (1892).

¹³ *Hibernia Sav. & Loan Soc’y v. Dickinson*, 167 Cal. 616, 619–20, 140 P. 265, 267 (1914).

¹⁴ *Miller v. Keegan*, 92 Cal. App. 2d 846, 852, 207 P.2d 1073, 1076 (1949).

¹⁵ *Cf. Kirk v. Santa Barbara Ice Co.*, 157 Cal. 591, 594–95, 108 P. 509, 511 (1910).

court awards fees as part of the defendant's costs of suit.¹⁶ He need not file a [cross-complaint](#) in order to claim them.

[B] Subscription

Code of Civil Procedure section 128.8 provides that every pleading shall be signed by the party's attorney of record or, if the party is not represented by an attorney, by the party himself. This statute, however, is repealed effective January 1, 1999. New Code of Civil Procedure section 446(a), which takes effect on January 1, 1999, will require that every pleading be signed by the party or his attorney.¹⁷

[C] Verification

The defendant must verify the answer in the following cases:

- when the state or any other public entity is the plaintiff, unless admission of the truth of the complaint might subject the defendant to criminal prosecution, or the defendant is also a public entity
- when the complaint is verified.¹⁸

¹⁶ T.E.D. Bearing Co. v. Walter E. Heller & Co., 38 Cal. App. 3d 59, 64, 112 Cal. Rptr. 910, 914 (1974).

¹⁷ See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 6:487 (1996).

¹⁸ CODE CIV. PROC. § 446(a). The defendant must file a verified answer in a forfeiture proceeding even after filing a verified claim to the forfeited property. People v. \$400, 17 Cal. App. 4th 1615, 1620, 22 Cal. Rptr. 2d 161, 164 (1993).

See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:488--:493, :496--:498 (1996).

The defendant need not verify the answer, even if the complaint was verified, if the plaintiff filed the action in municipal court.¹⁹

➡ [Complaints: Verification](#) An answer is verified in the same manner and by the same persons as a complaint.²⁰

In private litigation the defendant is not entitled to defend a verified complaint unless he can deny its [material allegations](#) under penalty of perjury. A defendant is not excused from the duty to verify the answer by the fact that the admission of the truth of the complaint would show that he is guilty of a crime. He is entitled, however, to immunity against its use in any criminal prosecution.²¹ A witness does not waive his privilege against self-incrimination by filing a verified answer.²²

Information conveyed by a lawyer to the defendant in confidence for the purpose of verifying the answer is protected from disclosure by the attorney-client privilege unless the defendant waives the privilege.²³ Where the allegations of the answer are vague and conclusory and lack factual depth, the defendant's verifying the answer on [information and belief](#) is not a disclosure of a significant part of the confidential communication from the lawyer and therefore is not a waiver of the attorney-client privilege.²⁴

¹⁹ CODE CIV. PROC. § 92(a)

²⁰ CODE CIV. PROC. § 446(a).

²¹ DeCamp v. First Kensington Corp., 83 Cal. App. 3d 268, 280, 147 Cal. Rptr. 869, 876 (1978).

²² Alvarez v. Sanchez, 158 Cal. App. 3d 709, 715, 204 Cal. Rptr. 864, 868 (1984).

²³ Alpha Beta Co. v. Superior Court, 157 Cal. App. 3d 818, 827, 203 Cal. Rptr. 752, 757 (1984).

²⁴ Alpha Beta Co. v. Superior Court, 157 Cal. App. 3d 818, 831, 203 Cal. Rptr. 752, 759 (1984).

§ 12.04 Content

[A] Denials

[1] General Denials

If the plaintiff filed his action in [municipal court](#) or did not [verify](#) his complaint, the defendant may respond to the complaint by generally denying the allegations in the complaint.²⁵ A general denial only puts in issue the [material allegations](#) of the complaint.²⁶

In any action in which the demand, exclusive of interest, or the value of the property in controversy does not exceed \$1,000, the defendant at his option, in lieu of demurrer or other answer, may file a general written denial and a brief statement of any new matter constituting a defense.²⁷ The Judicial Council has provided a [General Denial](#) form, the use of which is mandatory in such cases.²⁸

[2] Specific Denials

If the plaintiff [verified](#) the complaint and filed his action in superior court, the defendant must deny the plaintiff's allegations "positively."²⁹ If the defendant has

²⁵ CODE CIV. PROC. § 431.30(d). If the cause of action is a claim assigned to a third party for collection and the complaint is verified, the defendant must specifically deny the plaintiff's allegations, even if the complaint was filed in municipal court. *Id. See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:403–:411 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 981–982 (3d ed. 1985).

²⁶ CODE CIV. PROC. § 431.30(d).

²⁷ CODE CIV. PROC. § 431.40(a).

²⁸ RULES OF CT. 982(a)(13).

no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer and place his denial on that ground.³⁰

The defendant may deny the plaintiff's allegations

- by reference to specific paragraphs or part of the complaint

Example: "Defendant denies every allegation in paragraphs 2 through 10 of Plaintiff's complaint."

- by express admission of certain allegations of the complaint with a general denial of all the allegations not so admitted

Example: "Defendant admits the allegations in paragraphs 2 through 10 of Plaintiff's complaint and generally denies the balance of the allegations in the complaint."

- by denial of certain allegations upon information or belief, or for lack of sufficient information and belief, with a general denial of all allegations not so denied or expressly admitted.³¹

Example: "Defendant denies, on information and belief, the allegations in paragraphs 2 through 6 of Plaintiff's complaint. Defendant lacks sufficient information to respond to the allegations in paragraphs 7 through 10

²⁹ CODE CIV. PROC. § 431.30(d). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:412–:416 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 983–986 (3d ed. 1985).

³⁰ CODE CIV. PROC. § 431.30(e).

³¹ CODE CIV. PROC. § 431.30(f).

of Plaintiff’s complaint and on that basis denies those allegations. Defendant generally denies the balance of the allegations in the complaint.”

[a] Negative Pregnants

The methods of denial described above are the preferred practice for denying allegations in a complaint because a denial by any of these methods is sufficient to deny the **material allegations** in the paragraphs and parts to which the denial refers.³² The defendant may, however, follow the obsolete practice of specifically admitting or denying the plaintiff’s allegations, one by one. He runs the risk, however, that he may inadvertently fail to controvert a material allegation.

Suppose, for instance, that the plaintiff alleges, “The defendant took ten cows that belong to me,” and that the defendant responds, “Defendant denies that he took ten cows that belong to Plaintiff.” According to ancient common law pleading rules, the defendant’s denial is “pregnant” with an admission that he took nine cows belonging to the plaintiff. In order specifically to deny the allegation, the defendant must allege, “Defendant denies that he took any cows belonging to Plaintiff.” Similarly, if the defendant denies that he “made, executed, and delivered” his contract to the plaintiff, the defendant denies only that he did all three actions and admits that he did any two of them. Thus, he admits that he executed the contract.³³ This latter form of negative pregnant is known as a *conjunctive denial*.

³² Conley v. Lieber, 97 Cal. App. 3d 646, 656–57, 158 Cal. Rptr. 770, 775–76 (1979). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:417–:422 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 991–993 (3d ed. 1985).

³³ Janeway & Carpender v. Long Beach Paper & Paint Co., 190 Cal. 150, 153, 211 P. 6, 7 (1922).

[b] Denial on Information and Belief

As noted above, if the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer and place his denial on that ground.³⁴ A denial upon information and belief, or for want of information or belief, of an alleged fact that the defendant may ascertain from the inspection of a public record does not, however, controvert the alleged fact, and such a denial constitutes an admission of the allegation.³⁵

Example: *Agency* sues *D* on an assigned debt and alleges that it is a licensed collection agency. *D* denies the allegation on information and belief. In closing argument, *D* points out that *Agency* failed to prove its status as a licensed collection agency. The court denies *Agency*'s motion to re-open the case to permit proof of *Agency*'s status and renders judgment for *D*.

The court erred. One may not deny matters of official record on information and belief; consequently, the licensure question was never properly placed in issue, and *Agency* had no burden to prove its status.³⁶

The same is true of denials for lack of information or belief of matters presumably within the defendant's knowledge, such as:

³⁴ CODE CIV. PROC. § 431.30(e). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:423--:429 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 987-990 (3d ed. 1985).

³⁵ *Oliver v. Swiss Club Tell*, 222 Cal. App. 2d 528, 539, 35 Cal. Rptr. 324, 329 (1963).

³⁶ *Transworld Systems, Inc. v. Rogan*, 210 Cal. App. 3d 731, 733, 258 Cal. Rptr. 555, 556 (1989).

- whether the defendant entered into a contract with the plaintiff³⁷
- whether the plaintiff performed his obligations under the contract³⁸
- whether the defendant delivered a promissory note³⁹
- whether the defendant paid a promissory note⁴⁰
- whether the plaintiff sold and delivered goods to the defendant⁴¹
- whether the plaintiff performed work of a certain value on the defendant's building⁴²
- whether the plaintiff furnished defendant with proof of disability⁴³
- whether the defendant employed the driver who injured the plaintiff.⁴⁴

[B] Admissions

As discussed [below](#), a defendant may admit a plaintiff's allegation by failing to deny it. The defendant may also expressly admit an allegation.⁴⁵ Such an admission extinguishes any triable issue of fact raised by the plaintiff's allegation. Evidence

³⁷ *Zany v. Rawhide Gold Mining Co.*, 15 Cal. App. 373, 375, 114 P. 1026, 1027 (1911).

³⁸ *Zany v. Rawhide Gold Mining Co.*, 15 Cal. App. 373, 375, 114 P. 1026, 1027 (1911).

³⁹ *Goldwater v. Oltman*, 210 Cal. 408, 425, 292 P. 624, 631 (1930).

⁴⁰ *Overton v. White*, 18 Cal. App. 2d 567, 570–71, 64 P.2d 758, 759 (1937).

⁴¹ *Dobbins v. Hardister*, 242 Cal. App. 2d 787, 794, 51 Cal. Rptr. 866, 870 (1966).

⁴² *Boscut v. Bohlig*, 173 Cal. 687, 689, 162 P. 100, 101–02 (1916).

⁴³ *Dietlin v. General Am. Life Ins. Co.*, 4 Cal. 2d 336, 349, 49 P.2d 590, 597 (1935).

⁴⁴ *Bence v. Teddy's Taxi*, 112 Cal. App. 636, 643, 297 P. 128, 131 (1931).

⁴⁵ See generally 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 975, 978 (3d ed. 1985).

bearing on such an issue of fact is rendered irrelevant. (The evidence would be admissible, however, if relevant to some other triable issue of fact.)

➡ Demurrers: Omission of an Element of the Plaintiff's Cause of Action

A attempted denial may have the unintended effect of an admission. An affirmative allegation in a denial may cure the omission of the same allegation from the complaint.⁴⁶

[C] Affirmative Defenses

[1] Issues Raised by Affirmative Defense

In addition to the defendant's denials, the answer must contain a statement of "any new matter constituting a defense."⁴⁷ Such new matters are referred to as *affirmative defenses*. Whether an allegation constitutes a denial or an affirmative defense depends on the nature of the allegation, not the defendant's characterization of the allegation as a denial or as an affirmative defense.⁴⁸ If the answer sets forth facts showing that the plaintiff has no cause of action, even assuming the truth of the allegations of the complaint, those facts are new matter. But if those facts only show that some essential allegation of the complaint is not true, then such facts are not new matter.⁴⁹ In general, the defendant bears the burden of proof with respect to new matter raised by affirmative defenses; the plaintiff bears the burden of proof with respect to matters the defendant has denied.⁵⁰

⁴⁶ Marr v. Postal Union Life Ins. Co., 40 Cal. App. 2d 673, 105 P.2d 649 (1940)

⁴⁷ CODE CIV. PROC. § 431.30(b)(2). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:430–:446, :455–:456 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, Pleading § 1004 (3d ed. 1985).

⁴⁸ Cahill Bros., Inc. v. Clementina Co., 208 Cal. App. 2d 367, 385, 25 Cal. Rptr. 301, 311 (1962).

⁴⁹ Goddard v. Fulton, 21 Cal. 430, 436 (1863).

[a] Tort Cases

The defendant bears the burden of pleading, and proving, the following affirmative defenses in tort cases:

- self-defense⁵¹
- privilege or justification⁵²
- truth⁵³
- comparative fault⁵⁴
- assumption of the risk⁵⁵
- exclusive workers' compensation remedy.⁵⁶

⁵⁰ Cahill Bros., Inc. v. Clementina Co., 208 Cal. App. 2d 367, 385, 25 Cal. Rptr. 301, 311 (1962).

⁵¹ Dutro v. Castoro, 16 Cal. App. 2d 116, 117, 60 P.2d 182, 183 (1936). *See generally* 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 1023, 1025–1027 (3d ed. 1985).

⁵² Mayes v. Sturdy N. Sales, Inc., 91 Cal. App. 3d 69, 79, 154 Cal. Rptr. 43, 49 (1979) (inducing breach of contract); A.F. Arnold & Co. v. Pacific Professional Ins., Inc., 27 Cal. App. 3d 710, 715, 104 Cal. Rptr. 96, 99 (1972) (interference with prospective advantage); Peoples v. Tautfest, 274 Cal. App. 2d 630, 635, 79 Cal. Rptr. 478, 482 (1969) (defamation).

⁵³ Lipman v. Brisbane Elementary Sch. Dist., 55 Cal. 2d 224, 233, 359 P.2d 465, 469, 11 Cal. Rptr. 97, 101 (1961).

⁵⁴ *Cf.* Kenny v. Kennedy, 9 Cal. App. 350, 351, 99 P. 384, 385 (1908).

⁵⁵ Inouye v. Pacific Gas & Elec. Co., 53 Cal. 2d 361, 367, 348 P.2d 208, 212, 1 Cal. Rptr. 848, 852 (1959).

⁵⁶ Popejoy v. Hannon, 37 Cal. 2d 159, 173, 231 P.2d 484, 493 (1951).

[b] Contract Cases

The defendant bears the burden of pleading, and proving, the following affirmative defenses in contract actions

- statute of frauds
- fraud⁵⁷
- mistake⁵⁸
- duress⁵⁹
- minority
- incompetence
- plaintiff's breach⁶⁰
- impossibility of performance⁶¹
- failure of consideration⁶²
- rescission⁶³

⁵⁷ Cf. *California Trust Co. v. Gustason*, 15 Cal. 2d 268, 272–73, 101 P.2d 74, 76 (1940) (inadequate pleading of fraud). See generally 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 1011–1014, 1016–1017 (3d ed. 1985).

⁵⁸ *Siem v. Cooper*, 79 Cal. App. 748, 752, 250 P. 1106, 1107 (1926).

⁵⁹ *Bridge v. Ruggles*, 202 Cal. 326, 331, 260 P. 553, 555 (1927).

⁶⁰ *Eucalyptus Growers Ass'n v. Orange County Nursery & Land Co.*, 174 Cal. 330, 335, 163 P. 45, 47 (1917).

⁶¹ *Eucalyptus Growers Ass'n v. Orange County Nursery & Land Co.*, 174 Cal. 330, 335, 163 P. 45, 47 (1917).

⁶² *Riegel v. Wollenshlager*, 49 Cal. App. 300, 302, 193 P. 160, 160 (1920).

- novation⁶⁴
- accord and satisfaction⁶⁵
- failure to arbitrate.⁶⁶

In an action on a written contract, the plaintiff need not plead that the contract is supported by consideration. If the plaintiff pleads consideration, the allegation is unnecessary. If the defendant wishes to defend the claim on the ground that the contract is not supported by consideration, he must plead lack of consideration as an affirmative defense; denial of the plaintiff's unnecessary allegation of consideration is not sufficient.⁶⁷

If the defendant contends that the plaintiff failed to mitigate his damages, the defendant must plead this new matter as an affirmative defense. On the other hand, if the defendant merely contends that the plaintiff's recovery should be diminished because of income the plaintiff earned in mitigation of his damages, the defendant may raise this issue merely by denying the plaintiff's claimed damages.⁶⁸

⁶³ *Stanton v. Santa Ana Sugar Co.*, 84 Cal. App. 206, 208, 257 P. 907, 908 (1927).

⁶⁴ *Alexander v. Angel*, 37 Cal. 2d 856, 860, 236 P.2d 561, 563 (1951).

⁶⁵ *Owens v. Noble*, 77 Cal. App. 2d 209, 215, 175 P.2d 241, 244 (1946).

⁶⁶ *Pierce v. Wright*, 117 Cal. App. 2d 718, 725, 256 P.2d 1049, 1053 (1953).

⁶⁷ *California Standard Fin. Corp. v. J.D. Millar Realty Co.*, 118 Cal. App. 185, 191, 5 P.2d 41, 43–44 (1931).

⁶⁸ *Erler v. Five Points Motors*, 249 Cal. App. 2d 560, 567, 57 Cal. Rptr. 516, 522 (1967).

[c] Real Property Cases

A purchaser of real property may defend the seller’s action for ejectment by pleading an affirmative defense based on the purchase agreement⁶⁹ or on the seller’s fraud.⁷⁰

In partition actions, the defendant must plead in his answer any interest he claims in the property⁷¹ and “[a]ny facts tending to controvert such material allegations of the complaint as the defendant does not wish to be taken as true.”⁷² If the defendant claims a lien on the property, his answer must set forth the date and character of the lien and the amount remaining due.⁷³ The answer may also set forth any claim the defendant has for contribution or other compensatory adjustment.⁷⁴

[i] Unlawful Detainer Cases

In unlawful detainer cases one may seek to avoid eviction by pleading as affirmative defenses any matters which, if established, would preclude the landlord from recovering possession of the property,⁷⁵ including

- that the landlord agreed to lease the premises to the tenant⁷⁶
- that the landlord breached the implied warranty of habitability⁷⁷

⁶⁹ *Williams v. Rush*, 134 Cal. App. 554, 557, 25 P.2d 888, 890 (1933). See generally 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 1032–1033, 1038 (3d ed. 1985).

⁷⁰ *Nevada Land & Inv. Corp. v. Sistrunk*, 220 Cal. 174, 177, 30 P.2d 389, 390 (1934).

⁷¹ CODE CIV. PROC. § 872.410(a).

⁷² CODE CIV. PROC. § 872.410(b). Query: Why would not a simple [denial](#) suffice?

⁷³ CODE CIV. PROC. § 872.420.

⁷⁴ CODE CIV. PROC. § 872.430.

- that the landlord partially evicted the tenant⁷⁸
- that the landlord has a racially discriminatory motive⁷⁹
- that the eviction is sought in retaliation for the tenant's exercise of his statutory rights.⁸⁰

[ii] Condemnation Cases

In condemnation actions the defendant must include in his answer a statement of the nature and extent of the interest he claims in the property described in the plaintiff's complaint.⁸¹ If the defendant seeks compensation for loss of goodwill, he must include a statement he claims such compensation, but the answer need not specify the amount.⁸² The defendant may object by **demurrer** to the plaintiff's right to take if the defect appears on the face of the complaint. If not, he may object to the

⁷⁵ Green v. Superior Court, 10 Cal. 3d 616, 637, 517 P.2d 1168, 1179 n.19, 111 Cal. Rptr. 704, 715 n.19 (1974); Nork v. Pacific Coast Medical Enters., Inc., 73 Cal. App. 3d 410, 415, 140 Cal. Rptr. 734, 736 (1977) (a tenant may not claim an earlier unrelated debt owed by the landlord as a setoff for past due rent). *See generally* 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 1034–1036 (3d ed. 1985).

⁷⁶ Schubert v. Lowe, 193 Cal. 291, 295, 223 P. 550, 552 (1924).

⁷⁷ Green v. Superior Court, 10 Cal. 3d 616, 637, 517 P.2d 1168, 1182, 111 Cal. Rptr. 704, 718 (1974).

⁷⁸ *Cf.* Giraud v. Milovich, 29 Cal. App. 2d 543, 548–49, 85 P.2d 182, 185 (1938).

⁷⁹ Abstract Inv. Co. v. Hutchinson, 204 Cal. App. 2d 242, 255, 22 Cal. Rptr. 309, 317 (1962).

⁸⁰ S.P. Growers Ass'n v. Rodriguez, 17 Cal. 3d 719, 723, 552 P.2d 721, 723, 131 Cal. Rptr. 761, 763 (1976); Schweiger v. Superior Court, 3 Cal. 3d 507, 517, 476 P.2d 97, 103, 90 Cal. Rptr. 729, 735 (1970).

⁸¹ CODE CIV. PROC. § 1250.320(a). *See generally* 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 1037 (3d ed. 1985).

⁸² CODE CIV. PROC. § 1250.320(b).

plaintiff's right to take by means of an affirmative defense stating the specific ground upon which the defendant objects and the specific facts upon which he bases his objection. He may object on more than one ground, and the grounds may be inconsistent.⁸³ The defendant may object on the following grounds:

➔ Inconsistent Defenses

- The plaintiff is not authorized by statute to exercise the power of eminent domain for the purpose stated in the complaint.
- The stated purpose is not a public use.
- The plaintiff does not intend to devote the property described in the complaint to the stated purpose.
- There is no reasonable probability that the plaintiff will devote the described property to the stated purpose within (1) seven years, or (2) 10 years where the property is taken pursuant to the Federal Aid Highway Act of 1973⁸⁴ or (3) such longer period as is reasonable.
- The described property is not subject to acquisition by the power of eminent domain for the stated purpose.
- The plaintiff seeks to acquire the described property pursuant to Code of Civil Procedure section 1240.410 (excess condemnation), 1240.510 (condemnation for compatible use), or 1240.610 (condemnation for more necessary public use), but the acquisition does not satisfy the requirements of those provisions.
- The plaintiff seeks to acquire the described property pursuant to Code of Civil Procedure section 1240.610 (condemnation for more necessary public use), but

⁸³ CODE CIV. PROC. § 1250.350.

⁸⁴

the defendant has the right under section 1240.630 to continue the public use to which the property is appropriated as a joint use.⁸⁵

If the plaintiff has not adopted a valid resolution of necessity, the defendant may object on the following additional grounds:

- The plaintiff is a public entity and has not adopted a valid resolution of necessity.
- The public interest and necessity do not require the proposed project.
- The plaintiff has not planned or located the proposed project in the manner that will be more compatible with the greatest public good and the least private injury.
- The property described in the complaint is not necessary for the proposed project.
- The plaintiff is a quasi-public entity⁸⁶ and has not obtained a resolution consenting to the acquisition by the local city council or county board of supervisors.⁸⁷

The proper method for the defendant to seek damages for the plaintiff's unreasonable precondemnation actions is by way of answer to the condemnation complaint.⁸⁸

⁸⁵ CODE CIV. PROC. § 1250.360.

⁸⁶ See CODE CIV. PROC. § 1245.320.

⁸⁷ CODE CIV. PROC. § 1250.370.

⁸⁸ *People v. Peninsula Enters., Inc.*, 91 Cal. App. 3d 332, 353, 153 Cal. Rptr. 895, 906 (1979).

A defendant may, at any time, file a disclaimer stating that he claims no interest in the property or in the compensation that the court may award, and such a disclaimer supersedes an answer previously filed.⁸⁹

[iii] Equitable Defenses

If the defendant has an equitable property interest that defeats the plaintiff's cause of action without any affirmative relief from the court, then the defendant may raise his equitable defense by a simple denial of the plaintiff's allegations. But if the defendant's equity requires affirmative court relief (*e.g.*, specific performance, restitution, or reformation), then the defendant must plead the facts entitling him to such relief, the matter being in the nature of a **cross-claim**.⁹⁰ One cannot assert the defense of fraud justifying cancellation of a deed or imposition of a constructive trust when the pleadings contain merely general allegations asserting the defendant's ownership and denying that of the plaintiff.⁹¹

➔ Defenses Raised by Denial

[d] Civil Actions Generally

The defendant has the burden of pleading and proving the following affirmative defenses:

- plaintiff's **lack of capacity**⁹²

⁸⁹ CODE CIV. PROC. § 1250.325(a). The defendant must personally sign the disclaimer. *Id.*

⁹⁰ *Wade v. Howe*, 2 Cal. App. 2d 435, 439–40, 38 P.2d 439, 440–41 (1934).

⁹¹ *Strong v. Strong*, 22 Cal. 2d 540, 546, 140 P.2d 386, 398 (1943). *See generally* 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 1030–1031 (3d ed. 1985).

⁹² *United Medical Management Ltd. v. Gatto*, 49 Cal. App. 4th 1732, 1740, 57 Cal. Rptr. 2d 600, 604 (1996) (foreign corporation's failure to register with secretary of state). *See generally* 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 1044–1046 (3d ed. 1985).

- waiver⁹³
- estoppel⁹⁴
- election of remedies⁹⁵
- release⁹⁶
- [compulsory cross-complaint](#) rule⁹⁷
- immunity⁹⁸
- discharge in bankruptcy.⁹⁹

[i] Statute of Limitations

➔ Demurrers: Statute of Limitations

If it appears from the face of the complaint that the applicable statute of limitations bars the plaintiff’s cause of action, the defendant may raise the statute of limitations defense by way of a [general demurrer](#). If not, the defendant must plead

⁹³ California Academy of Sciences v. County of Fresno, 192 Cal. App. 3d 1436, 1442, 238 Cal. Rptr. 154, 157 (1987).

⁹⁴ California Academy of Sciences v. County of Fresno, 192 Cal. App. 3d 1436, 1442, 238 Cal. Rptr. 154, 157 (1987). A defendant may assert an estoppel without having pled it as an affirmative defense if the defendant had no way of knowing, when he answered the complaint, that his defense might depend on an estoppel. Bush v. Rogers, 42 Cal. App. 2d 477, 482, 109 P.2d 379, 381–82 (1941).

⁹⁵ Roam v. Koop, 41 Cal. App. 3d 1035, 1044, 116 Cal. Rptr. 539, 545 (1974).

⁹⁶ Hildebrand v. Stonecrest Corp., 174 Cal. App. 2d 158, 165, 344 P.2d 378, 383 (1959). *See generally* 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 1015, 1018, 1024, 1029 (3d ed. 1985).

⁹⁷ Hulsey v. Koehler, 218 Cal. App. 3d 1150, 1158, 267 Cal. Rptr. 523, 526 (1990).

⁹⁸ McMahan’s v. City of Santa Monica, 146 Cal. App. 3d 683, 689, 194 Cal. Rptr. 582, 586 (1983).

⁹⁹ Luse v. Peters, 219 Cal. 625, 629, 28 P.2d 357, 358 (1933). *But see* 11 U.S.C. § 524(a) (discharge of debt is not waived by failure to plead).

the statute of limitations as an affirmative defense; if he fails to assert the defense by demurrer or in his answer, he forfeits the defense.¹⁰⁰ His failure to urge it by way of demurrer does not deprive him of the right to rely on the defense in his answer.¹⁰¹

In pleading the statute of limitations one need not state the facts showing the defense. Instead, one may plead generally that the plaintiff's cause of action is barred by a particular provision of the Code of Civil Procedure, stating the number of the section and subdivision relied upon.¹⁰² If the defendant pleads the wrong statute of limitations, he forfeits his defense based on the right statute of limitations (unless the plaintiff fails to object).¹⁰³ The same is true if he pleads the wrong subsection or omits the applicable subsection, though the court's refusal of leave to amend would constitute an abuse of discretion.¹⁰⁴ The defendant's pleading of inapplicable statutes of limitations does not undermine the effectiveness of his pleading of the correct statute of limitations.¹⁰⁵

¹⁰⁰ *Minton v. Cavaney*, 56 Cal. 2d 576, 581, 364 P.2d 473, 476, 15 Cal. Rptr. 641, 644 (1961). A claim barred by the statute of limitations may not be allowed by the personal representative of an estate or approved by the court. PROB. CODE § 9253. See generally 5 B.E. WITKIN, CALIFORNIA PROCEDURE, Pleading §§ 1039–1043 (3d ed. 1985).

¹⁰¹ *Stafford v. Russell*, 117 Cal. App. 2d 319, 321, 255 P.2d 872, 873 (1953).

¹⁰² CODE CIV. PROC. § 458. Query: What if the limitations provision appears in a code other than the Code of Civil Procedure?

¹⁰³ *Mysel v. Gross*, 70 Cal. App. 3d Supp. 10, 15, 138 Cal. Rptr. 873, 876 (1977). But cf. *County of San Mateo v. Booth*, 135 Cal. App. 3d 388, 399, 185 Cal. Rptr. 349, 356 (1982) (defendant did not forfeit the statute of limitations where the answer quoted the correct statute but cited the wrong section number).

¹⁰⁴ *Hopkins v. Hopkins*, 116 Cal. App. 2d 174, 185, 253 P.2d 723, 730–31 (1953).

¹⁰⁵ *Hagely v. Hagely*, 68 Cal. 348, 352, 9 P. 305, 308 (1886).

[ii] Res Judicata

➔ Demurrers: Res
Judicata

If the complaint discloses on its face that the plaintiff's claim is barred by the defense of res judicata (*i.e.*, that the matter was resolved in an earlier lawsuit), the plaintiff may raise the defense by **general demurrer**. Otherwise, the defendant must plead res judicata as an affirmative defense.¹⁰⁶ If, however, the defendant did not have an opportunity to plead res judicata (*e.g.*, the judgment in the prior action was not final by the time the defendant had to answer), he may nevertheless raise the defense of res judicata at trial.¹⁰⁷ If possible, however, the defendant should raise the defense in an amended or supplemental pleading.¹⁰⁸

Collateral estoppel is not an affirmative defense because collateral estoppel merely involves conclusive evidence of a fact in issue, whereas res judicata results in a complete defense.¹⁰⁹

[iii] Equitable Defenses

➔ Demurrers: Laches

If the complaint in an equitable action discloses on its face that the plaintiff is guilty of laches (*i.e.*, unreasonable delay), the defendant may raise the defense by **general demurrer**. Otherwise, the defendant must plead laches as an affirmative defense.¹¹⁰

The defense that the plaintiff comes to court with unclean hands (*i.e.*, is guilty of wrongdoing in connection with the subject matter of the lawsuit) must be pleaded or

¹⁰⁶ CODE CIV. PROC. § 1908.5; *Hulsey v. Koehler*, 218 Cal. App. 3d 1150, 1158, 267 Cal. Rptr. 523, 526 (1990). *See generally* 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 1049–1050 (3d ed. 1985).

¹⁰⁷ CODE CIV. PROC. § 1908.5;

¹⁰⁸ *Bennett v. Forrest*, 24 Cal. 2d 485, 493, 150 P.2d 416, 420 (1944).

¹⁰⁹ *Hulsey v. Koehler*, 218 Cal. App. 3d 1150, 1158, 267 Cal. Rptr. 523, 526 (1990).

called to the attention of the trial court to be available as a defense.¹¹¹ Like the defense of **illegality**, the defendant does not forfeit the defense of unclean hands by failing to plead it. If a court of equity discovers that a transaction is tainted by fraud, it may withhold equitable relief on its own motion.¹¹²

[iv] Setoff

If the plaintiff and the defendant had demands for money against each other at a moment when neither demand was barred by the statute of limitations, the defendant may assert in his answer his right to setoff the plaintiff's debt against his liability to the plaintiff.¹¹³ Setoff is an affirmative defense, which the defendant must plead as an affirmative defense in order to assert it in the litigation.¹¹⁴ He may maintain this defense even if the statute of limitations would bar an action by the defendant on his claim against the plaintiff. If the limitations period applicable to the defendant's claim has expired, the defendant may use the plaintiff's debt to reduce his liability to the plaintiff but may not recover the balance of the plaintiff's debt.¹¹⁵

¹¹⁰ Epperson v. Rosemond, 100 Cal. App. 2d 344, 345, 223 P.2d 655, 656 (1950). *But see* Phoenix Mut. Life Ins. Co. v. Birkelund, 29 Cal. 2d 352, 363, 175 P.2d 5, 11 (1946) (applying principles of laches despite defendant's failure to plead laches as an affirmative defense). *See generally* 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 1047–1048 (3d ed. 1985).

¹¹¹ Santoro v. Carbone, 22 Cal. App. 3d 721, 731, 99 Cal. Rptr. 488, 495 (1972).

¹¹² Woodcock v. Petrol Corp., 48 Cal. App. 2d 652, 656, 120 P.2d 889, 892 (1941).

¹¹³ CODE CIV. PROC. § 431.70. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:447–:452, :585–:591 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 1091–1092 (4th ed. 1997).

¹¹⁴ Interstate Group Administrators, Inc. v. Craven, Dargan & Co., 174 Cal. App. 3d 700, 706, 220 Cal. Rptr. 250, 253 (1985).

Example: Attorney *P* sues his former client, *D*, for \$4,000 in fees and costs. *D* files an answer and [cross-complaint](#) in which he asserts a claim against *P* for malpractice and seeks \$38,000 in damages. *D*'s claim is barred by the statute of limitations. The court subtracts *P*'s \$4,000 from *D*'s \$38,000 in damages and awards *D* \$34,000.

The court erred. *D* could not recover the full amount of his damages because of the expiration of the statute of limitations. He could, however, use the barred claim as a setoff against *P*'s claim to the extent of \$4,000.¹¹⁶

If the defendant failed to assert his claim in prior litigation with the plaintiff in which the defendant's claim was a [compulsory cross-complaint](#),¹¹⁷ the defendant may not setoff the plaintiff's now extinguished debt against his own liability to the plaintiff.¹¹⁸

If the defendant's debtor assigned his claim against the defendant to the plaintiff, the defendant may assert against the plaintiff the same right of setoff that he would have had against the debtor. If the defendant's debtor died, the defendant may assert against the successor to the claim against the defendant the same right of setoff that he would have had against the debtor.¹¹⁹

¹¹⁵ CODE CIV. PROC. § 431.70.

¹¹⁶ *Safine v. Sinnott*, 15 Cal. App. 4th 614, 619, 19 Cal. Rptr. 2d 52, 55 (1993).

¹¹⁷ CODE CIV. PROC. § 426.30(a).

¹¹⁸ CODE CIV. PROC. § 431.70.

¹¹⁹ CODE CIV. PROC. § 431.70.

If the defendant has a money judgment against the plaintiff, that judgment constitutes a “demand for money” for purposes of setoff. If the enforceability of the judgment has expired, for purposes of setoff the judgment is treated like a demand for money that is barred by the statute of limitations.¹²⁰

The statutory setoff right is not absolute and can be limited when the assertion of that right would defeat a public policy protecting the debtor.¹²¹

Example: Condominium owners association *P* sues *D* for unpaid monthly assessments relating to *D*’s condominium. *D* seeks leave to amend his cross-complaint to setoff damages he allegedly suffered as a result of the association’s failure to maintain common areas. The court denies *D*’s motion.

The court ruled correctly. The public policy supporting a condominium owner’s association’s right to receive assessments precluded *D*’s right to a setoff.¹²²

Considerations of equity bar the setoff of one party’s recovery against the other party when both parties carry adequate insurance to cover the damages found to be payable to an injured party.¹²³ An employer is not entitled to a setoff of an employee’s debt against wages due the employee.¹²⁴

¹²⁰ CODE CIV. PROC. § 431.70.

¹²¹ *Jess v. Herrmann*, 26 Cal. 3d 131, 142–43, 604 P.2d 208, 214, 161 Cal. Rptr. 87, 93 (1979).

¹²² *Park Place Estates Homeowners Ass’n, Inc. v. Naber*, 29 Cal. App. 4th 427, 432, 35 Cal. Rptr. 2d 51, 54 (1994).

¹²³ *Jess v. Herrmann*, 26 Cal. 3d 131, ??, 604 P.2d 208, 214, 161 Cal. Rptr. 87, ?? (1979)[**check**].

¹²⁴ *Barnhill v. Robert Saunders & Co.*, 125 Cal. App. 3d 1, 6, 177 Cal. Rptr. 803, ?? (1981)[**check**].

[I] Actions by Common Interest Development Associations Against Contractors

➔ Presuit Consultation:
Actions by Common
Interest Development
Associations Against
Contractors

In any action by a condominium owners' association for damage to the condominium, the association's damages are reduced by the amount of damages allocated to the association or its managing agents in proportion to their share of responsibility based on principles of comparative fault. The defendant may raise the association's fault by means of an affirmative defense but may not bring a cross-action or separate action against the association for contribution or implied indemnity if the association or its members alone suffered damage.¹²⁵ The defendant may allege the association's comparative fault as a setoff even if the association is not a party or is no longer a party, whether by reason of settlement, dismissal, or otherwise.¹²⁶

[e] Exceptions

An exception exists for affirmative defenses that exist to promote public policy. A defendant does not forfeit the defense of illegality in a breach of contract case by failing to plead illegality as an affirmative defense. If the case made out by the plaintiff or the defendant shows illegality, the court has the duty, on its own motion, to refuse to enforce the contract.¹²⁷

¹²⁵ CODE CIV. PROC. § 383(b). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:453--454 (1996).

¹²⁶ CODE CIV. PROC. § 383(c).

¹²⁷ *Santoro v. Carbone*, 22 Cal. App. 3d 721, 732, 99 Cal. Rptr. 488, 496 (1972). *See generally* 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 1019–1020 (3d ed. 1985).

A special statute creates an exception in insurance cases. In an action on an insurance policy in which the insurer denies coverage on the ground that, although the proximate cause of the loss was a covered peril, the loss was caused by an excluded peril, the insurer must set forth in its answer the peril which was the proximate cause of the loss and in what manner the excluded peril contributed to the loss or itself caused the covered peril. If the insurer claims that the excluded peril caused the covered peril, the insurer must specify upon what premises or at what place the excluded peril caused the covered peril.¹²⁸

[2] Defenses Raised by Denial

An “affirmative defense” that alleges facts showing only that some essential allegation of the complaint is not true is simply a denial, and the defendant does not have the burden to allege such matters.¹²⁹

[a] Contract Cases

Defenses that a purported contract is void, that a promissory note is a forgery, or that the defendant paid a note according to its terms are merely denials of the plaintiff’s allegations that a contract exists, that the defendant executed the note, or that the defendant failed to pay the note. The defendant does not have the burden of pleading these matters as affirmative defenses; a general denial of the plaintiff’s allegations is enough.¹³⁰ The same is true of a defense that the parties’ oral contract is invalid by virtue of the statute of frauds.¹³¹

¹²⁸ CODE CIV. PROC. § 431.50.

¹²⁹ See generally 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 995–1003 (3d ed. 1985).

¹³⁰ FPI Dev., Inc. v. Nakashima, 231 Cal. App. 3d 367, 383–84, 282 Cal. Rptr. 508, 517 (1991).

[b] Negligence Cases

In negligence cases, the defendant may raise an “unavoidable accident” defense by denying negligence.¹³² In intentional tort cases, one may raise the defense of “consent” by a general denial.¹³³ The “advice of counsel” defense in malicious prosecution cases amounts to a denial of probable cause and does not require special pleading.¹³⁴

[c] Real Property Cases

In property cases, a denial of the plaintiff’s ownership raises an issue as to any defect in the plaintiff’s title, including whether a absolute deed is only a mortgage.¹³⁵

In an unlawful detainer action, if the plaintiff attaches to his complaint his three-day notice to pay rent or quit and the notice reveals on the face that it improperly demands rent owed more than one year before the three-day notice was served, the defendant places in issue the deficiency of the notice simply by denying the plaintiff’s allegation of service of a valid three-day notice; he is not required to plead his theory of ineffective notice as an affirmative defense.¹³⁶

¹³¹ San Francisco Brewing Corp. v. Bowman, 52 Cal. 2d 607, 618, 343 P.2d 1, 7 (1959).

¹³² Jolley v. Clemens, 28 Cal. App. 2d 55, 65, 82 P.2d 51, 57 (1938).

¹³³ Kritzer v. Citron, 101 Cal. App. 2d 33, 39, 224 P.2d 808, 812 (1950).

¹³⁴ Walker v. Jensen, 95 Cal. App. 2d 269, 275, 212 P.2d 569, 572 (1949).

¹³⁵ Smith v. Smith, 80 Cal. 323, 329, 21 P. 4, 22 P. 186 (1889).

¹³⁶ Beville v. Zoura, 27 Cal. App. 4th 694, 698, 32 Cal. Rptr. 2d 635, 638 (1994).

[d] Common Counts

Because of the uninformative nature of a common count, the courts have held that a [general denial](#) is sufficient to raise almost any defense to a common count.¹³⁷ When a complaint alleges a common count to recover a sum due on a book account and the defendant responds with a general denial, this places in issue every entry in the book account. The defendant is therefore entitled, by virtue of his general denial and without pleading an affirmative defense of setoff, to attack each of the entries to show that the plaintiff has no right to recover or to recover to the extent that he claims.¹³⁸ If, however, the defendant seeks to oppose a common count by means of a setoff defense based on a separate matter independent of the plaintiff's common count, the defendant must raise the issue as an affirmative defense.¹³⁹

§ 12.05 Consequences of Failure to Plead

Every material allegation of the complaint not controverted by the answer is taken as true.¹⁴⁰ A failure to deny a material allegation relieves the plaintiff of the necessity of offering evidence to support the allegation and precludes the defendant

¹³⁷ *Aetna Carpet Co. v. Penzner*, 102 Cal. App. 2d 859, 860, 228 P.2d 347, 348 (1951). *See generally* 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 998 (3d ed. 1985).

¹³⁸ *Interstate Group Administrators, Inc. v. Craven, Dargan & Co.*, 174 Cal. App. 3d 700, 708, 220 Cal. Rptr. 250, 254 (1985).

¹³⁹ *Carranza v. Noroian*, 240 Cal. App. 2d 481, 488, 49 Cal. Rptr. 629, 634 (1966).

¹⁴⁰ CODE CIV. PROC. § 431.20(a); RULES OF CT. 1238 (same rule applies to family law petitions and responses). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:398–:402, :472 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 972–974, 976 (3d ed. 1985).

from offering evidence to challenge it.¹⁴¹ A purported denial that is defective in form is no denial at all, and the plaintiff's material allegations stand uncontroverted. The defendant has no obligation to respond to immaterial allegations, and no admission results from the defendant's failure to deny an immaterial allegation.¹⁴²

A material allegation is one that is essential to the plaintiff's claim and that could not be stricken from the complaint without leaving it insufficient as to that claim.¹⁴³ An immaterial allegation is:

- an allegation that is not essential to the statement of a claim
- an allegation that is neither pertinent to nor supported by an otherwise sufficient claim
- a demand for judgment requesting relief that the allegations of the complaint do not support.¹⁴⁴

(An immaterial allegation is subject to a [motion to strike](#) as irrelevant matter.¹⁴⁵)

By failing to plead an affirmative defense the defendant forfeits the benefit of that defense. Evidence in support of the omitted defense is irrelevant and

¹⁴¹ Hennefer v. Butcher, 182 Cal. App. 3d 492, 504, 227 Cal. Rptr. 318, 325 (1986).

¹⁴² Hibernia Sav. & Loan Soc'y v. Dickinson, 167 Cal. 616, 619, 140 P. 265, 267 (1914).

¹⁴³ CODE CIV. PROC. § 431.10(a).

¹⁴⁴ CODE CIV. PROC. § 431.10(b)(1)–(3).

¹⁴⁵ CODE CIV. PROC. §§ 431.10(c), 436.

inadmissible.¹⁴⁶ The defendant's only remedy is to {[amend his answer](#)}, if he can, to add the omitted defense.

A defendant does not admit the plaintiff's allegations concerning the court's [subject matter jurisdiction](#), since the parties cannot confer jurisdiction on the court by their consent.¹⁴⁷

§ 12.06 The Mechanics of Pleading

➡ [Complaints: The Mechanics of Pleading](#)

Answers are subject to the same pleading rules that apply to complaints and require the pleading of [ultimate facts](#), as opposed to [conclusions of law](#) and [evidentiary facts](#). The defendant must allege facts as carefully and with as much detail as the facts that constitute the cause of action and are alleged in the complaint.¹⁴⁸

➡ [Demurrers: Statutes of Limitations](#)

In pleading a defense based on the statute of limitations the defendant need not state the facts showing the defense. The defendant may state generally that the cause of action is barred by the relevant statute of limitations, giving the number of the section and subsection relied upon.¹⁴⁹

¹⁴⁶ Carranza v. Noroian, 240 Cal. App. 2d 481, 488, 49 Cal. Rptr. 629, 634 (1966). *See generally* 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 1005 (3d ed. 1985).

¹⁴⁷ Taylor v. Taylor, 192 Cal. 71, 78, 218 P. 756, 759 (1923).

¹⁴⁸ FPI Dev., Inc. v. Nakashima, 231 Cal. App. 3d 367, 383, 282 Cal. Rptr. 508, 518 (1991). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:459, :462--:464 (1996).

[A] Inconsistent Defenses

➡ Complaints: Pleading
in the Alternative

Just as the plaintiff may plead the same cause of action in varied and inconsistent counts, the defendant may plead inconsistent defenses¹⁵⁰ and **cross-claims**.¹⁵¹

Example: *Water District* sues to enjoin *D* from impounding water in a dam. *D* defends on alternative theories, that his dam collects vagrant waters and that he has riparian rights to the water on his property. The court finds that there is no watercourse and rules in favor of *D*.

The court was not precluded from finding that no watercourse existed. Although the latter theory of defense impliedly admitted the existence of a watercourse, the former denied the same fact. One may plead several defenses in an answer though inconsistent in legal theory or in fact.¹⁵²

¹⁴⁹ CODE CIV. PROC. § 458. The requirement of specific allegation of section and subsection applies only to defenses based on statutes of limitations and does not extend to other statutory immunities. *Hata v. Los Angeles County Harbor/UCLA Medical Ctr.*, 31 Cal. App. 4th 1791, 1806, 37 Cal. Rptr. 2d 630, 638 (1995).

¹⁵⁰ *South Santa Clara Valley Water Conservation Dist. v. Johnson*, 231 Cal. App. 2d 388, 403, 41 Cal. Rptr. 846, 855 (1964). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 6:465–:467 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 1008–1010 (3d ed. 1985).

¹⁵¹ *Shepard & Morgan v. Lee & Daniel, Inc.*, 31 Cal. 3d 256, 261, 643 P.2d 968, 970, 182 Cal. Rptr. 351, 353 (1982).

¹⁵² *South Santa Clara Valley Water Conservation Dist. v. Johnson*, 231 Cal. App. 2d 388, 403, 41 Cal. Rptr. 846, 855 (1964).

A defendant's affirmative allegations, however, supersede conflicting general denials, which the court may disregard.¹⁵³

§ 12.07 Filing and Service

The defendant must file his answer with the clerk, accompanied by a proof of service, and serve a copy on the plaintiff or his attorney.¹⁵⁴ The total fee for filing the first paper in the action on behalf of any defendant, whether separately or jointly, is \$182.¹⁵⁵

¹⁵³ County of Butte v. Waters, 56 Cal. App. 2d 185, 187–88, 132 P.2d 517, 519 (1942).

¹⁵⁴ CODE CIV. PROC. § 465. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 6:499 (1996).

¹⁵⁵ GOV. CODE § 26826(a).